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# In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 131 2

HENRY C. HUBBARD,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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UNITED STATES OF AMERICA,

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered on November 16th, 1970 in the above styled case.

## OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit has not yet been reported but is appended hereto (pages 1A-4A). The opinion of the United States District Court for the Eastern District of Virginia is reported in 255 Fed. Rpt. 2d 324, and the portion thereof relating to this respondent is contained in the Appendix printed for the use of the court below, ten copies of which are filed with this court with this Petition. (Ap. 11-20)*

## JURISDICTION

The date of the judgment sought to be reviewed and the time of its entry is November 19th, 1970. The statutory provisions believed to confer on this Court jurisdiction to review the judgment in question by writ of certiorari are 28 USC 1254, 28 USC 1346(b) and 28 USC 2671.

## QUESTION PRESENTED FOR REVIEW

Has the Court of Appeals sanctioned a gross abuse of discretion by the trial court in finding for the defendant (Respondent here), when every reasonable intendment of fact favored plaintiff's claim that his injuries resulted from the negligence of agents and employees of defendant, United States of America? The ends of justice call for the exercise by this Court of its power of supervision, because the judgments entered below are clearly erroneous.

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*In this Petition "Ap." refers to the Appendix printed for the use of the United States Court of Appeals for the Fourth Circuit.

"Tr." refers to the Transcript of the testimony in the trial court.

"pp" refers to the appendix that is a part of this petition.

## STATEMENT OF THE CASE

Petitioner, Henry C. Hubbard, was one of twenty persons invited by the United States Army to participate in a supervised deer hunt at Camp A. P. Hill, Virginia, on November 30th and December 1, 1964. The letter of invitation (App. 33-34) outlined the rules and procedures adopted by the Army for the conduct of supervised deer hunts, and specifically directed all invitees to arrive at the Camp prior to dusk on the evening of November 29th, 1964, and paragraph 2(d) of the letter sets out the purpose as follows:

> "2(d) An element of the Post Hunting Section will brief us at the Lodge at 2000 hours on the evening prior to the first day of the hunt. They will also issue post hunting permits, temporary vehicle registration and public liability waivers, (par 2c, Inclosure 2), where necessary. Inasmuch as all processing will be conducted at the Lodge, you may go directly there."

As alleged in the Complaint (App. 4) and admitted by the defendant in its Answer (App. 9) the briefing of the hunting party the evening before the first day of the hunt was the established rule, custom and policy of the Army designed to avoid the danger of injury to the invited hunters. However, by permission of Major John F. Christensen, the Army's Congressional Liaison Officer, three of the invitees did not report to Camp A. P. Hill the evening of November 29th for processing and briefing, namely, Congressman Silvio O. Conte, Congressman Albert H. Quie, and a Mr. MacNichol (App. 27). They arrived at Camp A. P. Hill about 6:30 a.m. on the morning of No-

vember 30th (Ap. 33) when the rest of the hunting party were up, out and ready to take off for the first drive.

Upon arrival these three late-comers were taken to the PX snack bar (Ap. 44), had coffee, were issued post hunting permits, temporary vehicle registration, and executed public liability waivers, and informed that the hunting party would be divided into two teams, one of drivers and the other of standers, and were cautioned that when any driver came within sight of a stander, the stander should cry out "cease fire" and this admonition should be repeated down the line (Ap. 66). Lt. Martin, the officer in charge of the Post Hunting Section, testified that he drew a sketch on a piece of paper for Messrs. Conte, Quie and Mr. McFarland similar to the one he drew on the blackboard the night before for the 17 other hunters showing a horseshoe formation for the standers (Ap. 44-71).

This was categorically denied by Congressman Quie (Ap. 67) and by Congressman Conte (Ap. 37-40), each of whom denied being informed that standers would be placed other than in an approximately straight line, nor did they have any reason to know that other standers would be placed in a perpendicular line in front of them.

Two drives, each in a different area of the forest, were conducted on the morning of November 30th. Congressman Conte and plaintiff Hubbard were drivers on each of them. Conte testified that he was approximately in the center of the line of drivers—consisting of ten hunters—and two members of the Hunting Section on these hunts (Tr. 85). After lunch, served in the field, the hunting party moved to the area selected for the first drive of the afternoon in which Hubbard and Conte be-

same standers, Hubbard in the group in charge of Corporal Sleeman and Conte in the group in the charge of Sergeant Traynor (Ap. 36-47). A photograph of the formation of the standers for this drive is shown on page 71 of the Appendix used in the court below and there is an explanation of it in the Stipulation on pages 68 and 69. During this drive two deer run between Hubbard and Conte and Conte fired at about a 45 degree angle to his right front, missing the deer, but the shot struck Hubbard over the right eye, penetrating his skull and lodging in his brain.

The fact that one of the invited hunters had been shot caused considerable consternation and concern at the Camp and a reconstruction of the hunt was ordered immediately and conducted on the evening of November 30th and the morning of December 1st (Ap. 37 & 67).

Because of conflicting statements by Congressman Conte on the one hand and personnel of the Army on the other, this action was brought against the United States of America (28 USC 1346(b)) and Silvio O. Conte in separate counts of the one complaint (Ap. 3). Petitioner was required to try the case against both defendants at one trial. Conte demanded a jury, and the District Court heard the case as to the United States.

The jury found Congressman Conte not guilty of negligence and judgment was entered on that verdict on January 31, 1968. The District Court found the United States of America not guilty of negligence and entered its order dismissing Hubbard's claim on March 10th, 1969. The appeal to the Court of Appeals was dismissed by consent of all parties as to Congressman Conte.

## ARGUMENT

Hubbard based his claim against the United States primarily on two separate and distinct acts of negligence:

(a) Excusing Congressman Conte and two other invitees from reporting on the evening of November 29th, 1964, for processing and the briefing as prescribed by the established rules, procedures and practices for supervised deer hunts in effect at Camp A. P. Hill at the time in question, and

(b) The failure of Sergeant Martin F. Trayner, a member of the Post Hunting Section, to point out to Congressman Conte the area where the flankers (including Hubbard) would be placed by Corporal Sleeman to his right front, as the Sergeant was instructed to do by the same rules, procedures and practices (Ap. 45).

When Major Christensen excused Conte, Quie and McFarland from reporting at Camp A. P. Hill the evening before the first day of the hunt, contrary to established rules, he was guilty of actionable negligence attributable to defendant, United States of America. *U. S. vs. Shiveley*, 345 Fed.2nd 294. One look at the formation of the standers for the drive in which Hubbard was shot, as shown on the right side of the photograph (Ap. 71) certainly should convince any reasonable, fair-minded person that it was imperative every participant in the hunt should have had a thorough understanding of the unusual "flanker" formation used at Camp A. P. Hill. The time and place to have acquired this understanding was at the briefing of the entire hunting party on the evening of November 29th as directed by the established rules and

It was palpable error to conclude that the foregoing proven and established act of negligence could be avoided by the hurried, controverted processing conducted in a few minutes at the PX the following morning when everyone else in the party was ready and impatient to get into the woods.

The jury of twelve men and women that heard the same testimony at the same time with the trial judge decided that Congressman Conte was not at fault. They obviously did not believe that he had been adequately informed of the unusual stander formation, nor did they believe there was any evidence to indicate that he should have known by observation on previous drives conducted in various areas of the heavily wooded forest, he being in the middle of a quarter-mile line of drivers consisting of ten hunters and two army men 40 to 50 yards apart. (Tr. 85) The trial judge found that Congressman Conte had been adequately briefed at the hurried and controverted conversation he had with Lt. Martin and uses this finding to avoid the admitted violation of the established rules that required attendance at the Lodge the night before. Proven negligence is excused by a "maybe." If Conte had attended that meeting, Hubbard, it is fair to say, would not have been shot, and we would not be involved with this litigation. Why the trial judge felt free to ignore the judgment of the twelve jurors on the facts in this case is difficult to comprehend. It was an unwarranted abuse of judicial discretion and worse still, by an unreasonably rigid interpretation of Rule 52(a), Fed. R. Civ P., this arbitrary decision of the trial court was sanctioned by the Court of Appeals.

It was further alleged in Hubbard's complaint and proven in the trial, that it was the duty of members of

the Post Hunting Section when placing hunters, to point out other hunters to their right or left. (Ap. 3, 45). This rule and procedure was separate and distinct from all other instructions they had received. Mr. Conte testified that neither Sergeant Trayner nor anyone else ever informed him that standers would be placed in front of him on a line perpendicular to the main line of standers on which he was first hunter placed in the drive in which Hubbard was shot (Ap. 37). Sergeant Trayner testified he "couldn't say" that he pointed out to Conte other hunters to his right and left when he placed him (Ap. 56). He admitted that he had been instructed to do so (Ap. 54) but apparently did not consider a failure to do so particularly significant when he added "This was an obligation put out to him, as well as to me." (Ap. 54) Trayner obviously thought Conte had attended the briefing the night before the hunt. Yet, the Court of Appeals has held that "the factual determination that Conte had been informed as to where standing hunters were to be stationed * * * is dispositive of Hubbard's claim of negligence because of Sergeant Trayner's alleged failure to point out to Conte * * * the spot where Hubbard was stationed." (pp. 4A, 5A) This is a blunderbuss disposition of Hubbard's claims.

Both Courts below stressed with great emphasis the dangers involved for anyone going on a hunting trip, even to the point that Hubbard was guilty of contributory negligence merely because he accepted the invitation to join the hunting party (Ap. 20, pp. 3A). Whatever risks Hubbard assumed by joining the hunting party, he certainly did not assume the risk of the Army's negligence; he had a right to expect the Army would abide by its own rules and regulations. On the other hand, however, the lower courts did not consider that these stressed hazards required

any particular care for the protection of the invited guests by their hosts; their decisions even countermand abandonment of established regulations.

The deer hunt for November 30th and December 1, 1964 was carefully organized and carefully conducted, and the Army knows it. They do not put standers out like that any more (Ap. 45, 48). Hubbard's unfortunate experience has at least accomplished that much.

The trial judge, obviously somewhat dubious about its finding that Hubbard had failed to prove negligence on the part of the United States, then changes tack and charges that Hubbard was guilty of contributory negligence. We challenge anyone to point out in the record of this case any act or omission on the part of Henry C. Hubbard that could legally deny him relief because of his own contributory negligence. He was stationed on the right flank of the main line of standers by Corporal Sleeman. He sat there and he stood there on that spot. He did not move from it. He did not shoot (Ap. 51). This type of hunt required all standers to be very quiet. He had a right to expect that all standers on the main line knew of the area in which flankers were placed. If he had moved from his assigned position he then would have been on his own and in the event of a mishap, we may be sure the government would claim it his own fault; but he did not move and he was hit by Conte's shot because, as the jury found, Conte did not know other hunters would be placed where Hubbard was.

We respectfully submit that the trial court grossly abused its judicial discretion in exonerating the United States of America from liability for the careless, negligent

and reckless manner in which this particular hunt was organized and conducted, and it was error for the Court of Appeals to sanction it. The Court of Appeals apparently thought all three hunts of that day were conducted over the same area (pp. 3A, 4A).

Surely no one could seriously think the trial court made its decision on the basis of a credibility determination as between Lt. Martin, who was in charge of the Post Hunting Section, on the one hand, and Congressmen Quie and Conte on the other. The comments of the District Judge throughout the trial indicate his conviction that anyone who goes hunting is definitely lacking in good judgment, and if he suffers an injury, it is his own fault since he should have stayed at home in the first place. The Court of Appeals apparently considered it a credibility decision, in other words, that the trial court did not believe the testimony of Congressmen Conte and Quie, but did believe Lt. Martin, head of the Post Hunting Section, who understandably could have been quite disturbed if not scared, in view of the reaction of the authorities at Camp A. P. Hill when learning Hubbard was shot.

This Court has the inherent power to supervise the judicial proceedings of the Courts below. We sincerely believe that the findings of the district court as sanctioned by the Court of Appeals in this case are clearly erroneous and should be reviewed.

Rice vs U.S. 179 Fed 2nd 26,
U.S. vs U.S. Gypsum Co 68 S.Ct. 525

U.S. vs Oregon State Medical School 343 U.S. 326, 72 S.Ct. 694, 99 L.Ed. 978

McAllister vs U.S. 348 U.S. 19; 75 S.Ct. 6; 99 L.Ed. 20

It would be most disillusioning indeed if it should develop that a respected citizen of this country could be whipsawed in our Federal Courts as Henry C. Hubbard most assuredly has been so far in this case.

There remains another highly important issue in this litigation, which neither of the courts below have considered nor decided, the effectiveness of the Release signed by each of the invitees in Virginia, an actual photograph of which appears on page 72 of the Appendix. The government contended that this Release should be construed under Federal laws and petitioner claims Virginia law controls. There is a conflict among Circuit Court decisions on this question. It should be resolved. Petitioner proposes to present and argue the issue should a writ of certiorari be allowed.

## CONCLUSION

The United States Court of Appeals for the Fourth Circuit has sanctioned an arbitrary abuse of discretion by the United States District Court for the Eastern District of Virginia, which should be reviewed and reversed by this Court.

Respectfully submitted,

CARL BUDWESKY
117 North Fairfax Street
Alexandria, Virginia 22314

Alexandria, Virginia
February 4th, 1971.

In the

# United States Court of Appeals

## for the Fourth Circuit

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No. 13,620

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HENRY C. HUBBARD,

*Appellant,*

versus

UNITED STATES OF AMERICA,
and SILVIO O. CONTE,

*Appellees.*

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Decided November 10, 1970.)

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BOREMAN, Circuit Judge:

Henry C. Hubbard brought an action against the United States, under the Federal Tort Claims Act, 28 U.S.C. §1346(b), and against Silvio Conte, the latter a member of Congress, for damages resulting from injuries sustained by Hubbard as a result of having been shot in the hand by Conte during an organized and supervised deer hunt on a government reservation at Camp A. P. Hill, Virginia, to which Hubbard, Conte and some eighteen

other persons had been invited as guests of the United States Army. Negligence of the United States was charged in the first count of the complaint, and negligence of Conte was charged in the second count. Both counts of the complaint were heard together, before a jury as to defendant Conte and by the court as to the United States. The jury returned a verdict in favor of Conte and the court entered judgment in favor of the United States. Hubbard's appeal as to Conte was dismissed by consent and Hubbard prosecutes this appeal from the judgment in favor of the United States. We affirm.

The district court dismissed Hubbard's claim against the United States on the ground that Hubbard failed to prove that the Army was negligent in failing to discharge its duty to exercise reasonable care in selecting the place for, and in conducting, the hunt; further, even assuming that the Army was negligent, the Government would not be liable to Hubbard since he had been contributorily negligent and had assumed the risk of injury when he voluntarily joined the hunt.

At such deer hunts at Camp A. P. Hill, hunters were customarily divided into two groups, *i.e.*, drivers and standers. The standers were placed in stationary positions, and the drivers while making noise moved in a straight line toward the standers from some distance away, hoping to cause any deer in the area to run toward the standers. On the day of Hubbard's injury the standers were positioned in a "u"-shaped alignment, with the drivers moving in a straight line toward the open end of the "u." The two groups customarily exchanged duties during the hunting day so that all of the hunters would share time as drivers and as standers. Hubbard was injured during an afternoon hunt. Both Hubbard and Conte had been drivers at

the morning hunt, during which they should have become familiar with the terrain and should have seen how and where the hunt was conducted and where the standers were positioned.

In deciding that Hubbard had not sustained his burden of proving negligence on the part of the United States, the court necessarily was required to make a vital credibility resolution. There were irreconcilable conflicts in the evidence. Hubbard claimed that the United States had been negligent in excusing Conte and two other members of the hunting party from a briefing session which had been conducted by the Army for all other members of the party on the night before the hunt; and, that a briefing session conducted for these three members of the hunting party in the early morning of the day of the hunt had been quite brief and inadequate to inform these three persons as to the positioning of hunters during the hunt, which negligence was the proximate cause of Hubbard's injuries.

Lieutenant Martin testified that he had conducted a full briefing for these three hunters on the morning of the hunt and that he had drawn a rough diagram for them showing approximately where the hunters would be stationed, the area through which the deer would be driven, and the approximate firing pattern to be followed and observed by the various hunters. Conte and his companion, another of the three hunters who had been briefed by Lieutenant Martin on the morning of the hunt, denied that Martin had drawn a diagram of the hunt site to indicate where hunters would be stationed or the approximate firing pattern.

Hubbard recognizes that the standard of review of a trial court's factual determination is the "clearly erroneous" test, as set out in Rule 52(a), Fed.R.Civ.P., which states in pertinent part:

> "• • • Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. • • •"

As held in *United States v. Gypsum Co.*, 333 U.S. 364, 395 (1948):

> "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed."

The district court resolved the conflict in the evidence by crediting Lieutenant Martin's testimony and we cannot say that this factual finding was clearly erroneous.

The resolution of this credibility issue controls the resolution of Hubbard's claim that it was negligence to excuse Conte and two others from the briefing held on the night before the hunt. The district court found that a full and adequate briefing with diagrams was given to Conte and the two others on the morning of, and prior to, the hunt; thus, the time when the briefing occurred is of no significance.

The factual determination that Conte had been fully informed as to where the standing hunters were to be stationed and as to the approximate firing pattern, which

finding we accept, is dispositive of Hubbard's claim of negligence because of Sergeant Trayner's alleged failure to point out to Conte on the premises the exact spot where Hubbard was stationed[1] and his claim of negligence because he was placed within range of Conte's gun. Conte knew or should have known that one of the hunters would be stationed where Hubbard was in fact injured and that he should not fire in the direction of that station.

Our conclusion that the district court did not err in holding that Hubbard had not sustained his burden of proving actionable negligence on the part of the United States makes it unnecessary to discuss other issues which Hubbard raises on appeal.

*Affirmed.*

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[1]The district court did not explicitly find that Sergeant Trayner had advised Conte of Hubbard's specific location but the court did conclude that Hubbard's claim that Conte had not been so advised was not supported by the evidence.

SUPREME COURT, U. S.

Supreme Court, U.S.
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# In the Supreme Court of the United States

October Term, 1970

## No. 1,312

HENRY C. HUBBARD,

*Petitioner,*

vs.

UNITED STATES OF AMERICA,

*Respondent.*

## SUPPLEMENTAL APPENDIX

**(Opinion of the United States District Court for the Eastern District of Virginia) and Note**

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MIAMI REVIEW — 371-4033 — 377-3721

IN THE
UNITED STATES DISTRICT COURT
FOR THE
EASTERN DISTRICT OF VIRGINIA

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Docket No. 4816

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HENRY C. HUBBARD,

*Plaintiff,*

vs.

UNITED STATES OF AMERICA, and
SILVIO O. CONTE,

*Defendants.*

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## MEMORANDUM OPINION

OREN R. LEWIS, District Judge.

The plaintiff, Henry C. Hubbard, was shot while deer hunting on a United States military reservation. This suit for damages against the United States and one Silvio Conte followed.

In count one of his complaint Mr. Hubbard alleges that the commanding officer of the military reservation where the deer hunt was conducted, and his subordinate officers, were negligent in authorizing Congressman Conte and two other men, who did not attend the scheduled briefing the night before, to participate in the hunt and in

failing to point out to the Congressman the spot where the plaintiff was standing on his right, and by placing him and the Congressman within range of their guns; and that said negligence was the direct and proximate cause of his injuries.

In count two Mr. Hubbard alleges that Congressman Conte, together with two others, were briefed by Army personnel on the routine and rules of the hunt, namely, that the hunters would stand at assigned positions and that the deer would be driven towards them; that he was advised where fellow hunters were to stand and was cautioned to learn and know the position of the hunter on his right and left; and that all of the hunters were cautioned to fire only to the front or back and not in the direction of their fellow hunters; that he (Hubbard) was stationed on the Congressman's right flank some fifty or so yards to the south; that when two deer ran between them Congressman Conte fired his shotgun in the direction where he was standing, in a negligent manner, resulting in his being hit in the forehead, and that the Congressman's negligence in so doing was the proximate cause of his injuries.

Mr. Hubbard prayed for damages against the United States and Congressman Conte, or either of them.

The United States in its answer denied all acts of negligence laid to its military officers and alleged that had Congressman Conte followed the instructions given him the accident would not have occurred. The Government further pled assumption of risk and contributory negligence on the part of the plaintiff, and claimed that Mr. Hubbard's suit against it is barred by the indemnity

agreement he signed prior to engaging in the hunt. It cross-claimed against the plaintiff for any damages assessed against it in this proceeding.

Congressman Conte in his answer admitted the negligence sought to be laid to the United States in count one of the complaint and denied all acts of negligence laid to him in count two thereof. He also pled assumption of risk and contributory negligence on the part of the plaintiff and alleges that the indemnity agreement signed by the plaintiff prior to engaging in the hunt ran to him as a member of the Congress of the United States, and that if the said release be not so construed then the plaintiff's suit against him is barred on the ground that Mr. Hubbard has released a party who is or may be a joint-tenasor responsible for the injuries complained of.

Congressman Conte cross-claimed against the United States for damages assessed against him in favor of the plaintiff and demanded a jury trial on all issues.

Both claims, counts one and two, were heard together, the one against Congressman Conte by the jury and the one against the United States by the Court. The jury returned a verdict in favor of the defendant Conte. Judgment was entered thereon.

The plaintiff timely moved the Court to set aside the verdict and to vacate the judgment rendered thereon and to grant him a new trial on the ground the Court should not have given an instruction on assumption of risk and on contributory negligence, and upon the ground the Court improperly instructed the jury in telling them that in

order to find in favor of the plaintiff they must find that Conte's negligence was solely the cause of the plaintiff's injury.

Upon reviewing the transcript of the evidence and the charge to the jury, the Court is of the opinion that the plaintiff's motion for a new trial ought to be denied. An order to that end will be entered herein.

[1] Much of the evidence as to what happened on the day of the hunt was in dispute. The jury could have found the shooting accidental, caused by Conte's negligence, or the result of negligence on the part of Conte and Hubbard. The jury resolved the question in favor of Congressman Conte. There is ample evidence in the record to support that finding.

In the charge the jury was told that they would only determine the plaintiff's claim against the defendant Conte and that they would not have the benefit of the Court's decision in the plaintiff's claim against the United States because the liability, if any, on the part of the Government is not in one iota dependent upon the liability or non-liability on the part of Mr. Conte. Conversely, the liability of Mr. Conte has no bearing whatsoever—if there be any liability on his part, Conte's liability has no bearing whatsoever on Mr. Hubbard's claim against the Government.

Pertinent portions of the charge read:

"* * * [T]his was a deer hunt. You should take that into consideration. * * [O]ne who voluntarily goes on a deer hunt, and this applies to * * * both the plaintiff * * * and

the defendant, assumes the risk of injuries incident thereto and cannot recover for any injury received from such an activity, absent proof of negligence on the part of the person causing the injury complained of. In other words, reduced to simplicity, it gets back to the question of negligence."

Negligence was defined as follows:

"* * * [N]egligence is a word that you are all familiar with. It is, really, not hard if you stop to think, to consider it, and to apply it. Negligence is the failure of a person to use for the safety of another the care required of him by law after he knows, or by the exercise of reasonable diligence, could know of the danger to such other person, and after he has had a reasonable opportunity to exercise such care. Negligence is the doing or not doing of some act which a reasonably prudent person would not do under the same or identical circumstances and conditions here existing. In other words, it is the failure to use ordinary care under the circumstances existing. "Ordinary care, in law, is that care which reasonably prudent persons—and here, the persons we are referring to are reasonably prudent deer hunters—exercise in the management of their own affairs in order to avoid injury to themselves or their property or the persons or property of others.

" * * [O]rdinary care is not an absolute term, but a relative one. That is to say, in deciding whether ordinary care was exercised in a given case, the conduct in question must be viewed in the light of all the surrounding circumstances, as shown by the evidence in the case, * * * because the amount of care exercised by a reasonably prudent person varies in proportion to the danger known to be involved in what is being done, it follows that

the amount of caution required in the use of ordinary care will vary with the nature of what is being done [under] all the surrounding circumstances [as] shown by the evidence in the case." * * [P]ut [in] another way, as the danger that should be reasonably foreseen increases, so the amount of care required by law also increases."

The jury was further told:

"* * * [T]he mere fact that an accident has happened, or that someone has been shot, standing alone, does not permit the jury to draw the inference that the accident was caused by anyone's negligence.

"* * * [Y]ou are to * * * evaluate the evidence here in determining whether or not Mr. Conte [or] Mr. Hubbard * * * they are both charged with [the duty of] using ordinary care under the circumstances, and it is your duty to examine [the] evidence carefully and [determine] * * * whether or not Mr. Conte exercised * * * [the] care that an ordinary prudent hunter, hunting in the place and under the circumstances he was confronted with, would have then and there exercised.

"If you find that he did exercise such care, then, of course, he is not guilty of negligence. If you find that he failed to exercise that degree of care which I have explained to you, then he is guilty of negligence, and if you find from the evidence that he is guilty of negligence, you must next determine whether his negligence was solely the cause of the injuries complained of.

"* * * [S]o that you will understand what I mean, 'solely,' that means whether or not, as far as this case is concerned, his [Conte's] negligence—you are not called upon to determine whether or not it concurred with or did not concur with any negligence the government may or may not have been guilty of—this is an action only between Mr. Hubbard and this defendant and insofar as he is concerned and in response to a suit for judgment by Mr. Hubbard, his negligence—and you must so find—must solely have been responsible for Mr. Hubbard's injuries.

"* * * [E]ven though you find that he was negligent under the circumstances in this case, if you also find by a preponderance of the evidence that the plaintiff, himself, was guilty of any negligence under the circumstances, and negligence [as] to him * * * is the want of ordinary care that either caused or concurred or effectively contributed to his injury, then he cannot recover, because that is called contributory negligence, * * * the law in Virginia does not allow one, even though he is injured by someone else's negligence, to effectively contribute [in causing his] injury by his own negligence.

"* * * [T]he burden is upon the defendant in this case [to satisfy] you by a preponderance of the evidence, that the plaintiff was negligent. That is an affirmative defense. The plaintiff does not have to prove that he was not negligent or his negligence did not in any degree effectively contribute to cause or concur in causing his injury. Insofar as his negligence is concerned, that burden is upon the defendant, and if [he does] not satisfy you that his negligence—if you find any negligence on his part—effectively contributed to cause or concurred in causing his injury, then that defense fails."

When read as a whole, the word "solely" as used in the charge refers to Congressman Conte's negligence when equated with the plaintiff Hubbard's (contributory) negligence. The jury was clearly told they were not to consider the negligence, if any, on the part of the United States in their determination of whether or not there was negligence on the part of Congressman Conte. When so equated, Congressman Conte's negligence must be the sole cause of the plaintiff's injuries for him to recover.

[2] Mr. Hubbard's counsel argued to the jury that Congressman Conte was trying to lay the blame on the Government. That is why the Court so charged the jury. The Court perceives no reversible error in the use of the word "solely" as here used.

[3] The plaintiff complains only of the giving of an instruction on assumption of risk and on contributory negligence, not on the instructions as given. There was ample evidence in this case to require the giving of such instructions and the verdict of the jury will not be disturbed on that account.

The evidence and exhibits presented to the Court and the jury disclose that the deer hunt in question was held at the Camp A. P. Hill Military Reservation located in Caroline County, Virginia, on November 30, 1964. Mr. Hubbard was invited to participate in the hunt by Major J. A. Christensen, an Army legislative liaison officer, through a Mr. Nease. Congressman Conte received his invitation from Major Christensen via Congressman Quie.

Major Christensen sent all of the guests, including the plaintiff and the Congressman, a four- or five-page

letter on the stationery of the Secretary of the Army pertaining to the proposed hunt. This letter, among other things, listed the following safety rules:

"All hunting safety rules apply. *A RED OR YELLOW CAP AND ARTICLES OF OUTER UPPER CLOTHING IS REQUIRED.* Only empty guns, taken down or with action open, may be brought into or carried in Camp A. P. Hill except when bearer is actually hunting. Hunters will insure that they have a safe field of fire to and beyond their targets. Individuals shooting near any road or trail will take extra precautions to assure that the angle and direction of fire are such as not to endanger troops, passing motorists or pedestrians. * * *"

The letter further advised the guests that they would be briefed the evening prior to the first day of the hunt. Mr. Hubbard attended this briefing; Mr. Conte did not. He and two other gentlemen arrived at A. P. Hill early on the morning of the hunt. They were then briefed by a Lieutenant Martin, an Army officer who had conducted the briefing the previous night.

Lieutenant Martin drew a rough diagram of the hunt site, in the form of a horseshoe, showing the hunters approximately where they would be standing and the area through which the deer would be driven. He made a rough sketch of the fire plan for the hunting area. The hunters were allowed to fire until they received a word-of-mouth command to cease fire. Each hunter, on seeing the drivers, was to pass the command to cease fire to the hunter just ahead of him. The Lieutenant further testified that he instructed his subordinates to tell each hunter when placing him on the stand where the hunter on each side of him was located—they were told to point them out.

Both Mr. Hubbard and Congressman Conte were drivers during the morning hunt. Both were placed on stands after lunch. Two military vehicles drove the hunters to the hunt site. Sergeant Tryanor placed Congressman Conte some seventy-five meters from the intersection of the two trails near where the jeeps were parked. He said he was instructed by his superior officers re his duties in connection with the hunt. He was told how to place the hunters and to tell them how and when they could shoot. Each hunter was told to learn where the hunter on his right and left were located and was given a field of fire. Sergeant Traynor remembered the Hubbard accident but had no independent recollection of Congressman Conte or what he told him on the day in question, except that he remembered where he had placed the Congressman.

Corporal Sleeman placed Mr. Hubbard on Congressman Conte's right some fifty yards down the trail, south of the intersection of the trail on which Congressman Conte was stationed. He pointed the Congressman out to Mr. Hubbard. He then placed another hunter some thirty or forty yards below where he had placed Mr. Hubbard, and then went further down the trail into the woods awaiting the drive to begin. Shortly thereafter he saw two deer come by and heard two or three shots. He later shot at another deer that was then behind the drivers. He then went by to pick up Mr. Hubbard and noticed blood on his face. Mr. Hubbard then told him that the butt of his gun must have hit him in the face as he was shooting at the deer.

Congressman Conte was an experienced hunter. He admitted that he was familiar with the rules of deer

hunting and that he had hunted deer in several states. He said that he and two other gentlemen had been briefed by Lieutenant Martin some thirty minutes before the drive began. He had no recollection, however, of Lieutenant Martin showing him a sketch of the hunt ground. He was a driver on the morning hunt and was placed on the stand after lunch by Sergeant Traynor and was told where the deer were coming from and not to expose himself. He knew where the hunter on his left was located but did not know that there were any hunters on his right. He heard dogs and a shot and then saw two deer running in front of him. When he saw the large deer on his right at about a forty-five-degree angle, he shot and missed. The deer then ran towards him and he took two more shots. The deer then ran between him and the hunter on his left. The hunter on his left took a shot when the deer was behind him. The Corporal then came up and told him the hunt was over. He said that Mr. Hubbard was hurt. The Congressman said that he did not learn where Mr. Hubbard was stationed until the next day when he went back to the hunt site.

Mr. Hubbard was likewise an experienced hunter. He had been on previous deer hunts at Camp A. P. Hill. He admitted that Lieutenant Martin sketched the hunt area during the night briefing and that he told the hunters what to do and what not to do; that he told them to fire in front of them and to stop firing when the drivers said to cease fire. He said he walked some twelve paces from the trail and sat beside a tree waiting for the drive to begin. He said the terrain was so rough and the brush so thick he could see better by sitting down. He admits that Corporal Sleeman placed him but denied that the Corporal pointed out where Congressman Conte was stationed.

When he heard the deer coming he got up and raised his gun in a position to shoot. He could not then see more than thirty yards. He remembers hearing a shot and thought that he had fired and that his gun had hit him in the face. It was later learned that Mr. Hubbard's gun had not been fired.

Both Mr. Hubbard and the Congressman claimed that they could not see each other due to the terrain and the heavy growth and that it was snowing quite heavily and was quite dark when the drive began.

Mr. Hubbard was given first aid and was then taken to the Fredericksburg Hospital. He was then transferred to the Alexandria Hospital. X-ray films disclosed that a large bullet and bullet fragments had penetrated his right frontal lobe and that several fragments were lodged in the right parietal lobe. He was then taken to the operating room and a right frontal osteoplastic craniotomy was performed. The bullet fragments were removed, with the exception of the parietal fragment—it was left within the skull. Mr. Hubbard remained in the hospital for approximately one month. He required private nurses at home for several weeks thereafter.

Mr. Hubbard claims that he has frequent headaches and gets dizzy quite often and that he has suffered an impairment of memory since the accident. His wife says he was quite interested in his business prior to the accident and that he has lost all interest since the accident. Mr. Hubbard's treating physicians corroborated a substantial portion of his complaints.

The neurologists who examined Mr. Hubbard for the Government testified that Mr. Hubbard received a gunshot wound in the right frontal temporal region, and that he has no specific neurologic residual of injury by neurological examination at this time (date of trial).

Mr. Hubbard spent some $3,000.00 in hospital and medical expenses. He was sixty-nine at the time of the shooting. He and his wife, as sole owners of a corporation, were then engaged in the real estate and construction business.

Invitees to the hunt were required to execute an indemnity agreement prior to participation in the hunt. The release, signed by both Mr. Hubbard and Congressman Conte, reads as follows:

"I have read and understand Post Regulations regarding hunting and fishing and I agree to obey Federal and State of Virginia laws and all Post Regulations.

"GENERAL RELEASE

"For and in consideration of allowing me the privilege of being permitted upon the premises and property of the United States of America, specifically on the Military Reservation indicated above, for the purpose of hunting, fishing, boating, water skiing, or other sport activities, I do hereby agree to hold and save the Government, its officers, agents, servants, and employees in their capacities as such, and as individuals, harmless from liability of any kind or nature and I do hereby remise, release and forever discharge the UNITED STATES OF

AMERICA, its officers, agents, servants, and employees from any and all manner of claims, actions, suits, debts, judgments or demands of any kind whatsoever, based upon injury of any nature to my person or my property as a result of or as an incident to hunting, fishing, boating, water skiing, or other sport activities on said military reservation, as well as any activities connected therewith, including any travel or transportation which may arise, or thereafter can, shall, or may have.

"I certify under the penalties for perjury, that I am at least 21 years of age, or that the reverse side of the form is signed by my parent or guardian.

"I HAVE READ AND UNDERSTAND THE ABOVE.

Signature of Applicant

"Witness Date _____"

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Upon these findings the Court concludes that the United States is not liable for the injuries sustained by Mr. Hubbard while deer hunting on its A. P. Hill Military Reservation.

[4] Mr. Hubbard was an invited guest[1] of the United States Army. He was invited to participate in the

[1]See Smith v. Allen, 297 F.2d 235 (4th Cir. 1961) for an interesting discussion of the legal relation between host and guest—this is not a hunting case. No Virginia case has been cited specifically determining the relationship between host and invited hunter.

deer hunt in question by one of its legislative liaison officers. Under these circumstances the Army owed him the duty of exercising reasonable care in selecting the place for, and in conducting, the hunt.

[5] The burden is on the plaintiff to prove that the Army was negligent in performing one of these duties. He failed to do so.

The plaintiff offered no evidence designed to show the hunting site or the pre-hunt preparations and briefings were inadequate. To the contrary, the record here made discloses that all of the hunters, including the plaintiff, were fully advised of how and where the hunt was to be conducted—a lay-out in the shape of a horseshoe was drawn on the board for all to see. They were told how, when and where to shoot and where the hunters on their right and left were to be placed.

Mr. Hubbard and Congressman Conte were drivers on the morning hunt. They then became, or should have become, familiar with the terrain, and saw, or should have seen, how and where the hunt was conducted and where the hunters on the stands were spotted.

[6, 7] The plaintiff's claim that Congressman Conte was permitted to participate in the hunt without being briefed is not supported by the evidence. The fact that his briefing was conducted in the morning (before the hunt) and not the night before is immaterial.

[8] The plaintiff's claim that the Army personnel failed to advise Congressman Conte where they had placed him on the stand and that they had been placed within the range of each other's gun is likewise not sup-

ported by the evidence. The soldier who placed Mr. Hubbard pointed out where Congressman Conte had been placed. The soldier who placed the Congressman had no independent recollection of what he had told the Congressman—he said that he had been instructed to point out and to tell the hunters when he placed them to learn the exact location of the hunters on their right and left. This soldier had been performing hunt duty for several years. Both Mr. Hubbard and Congressman Conte said they did not know where the other was stationed until after the accident. Both were experienced deer hunters and both were told in their respective briefings to learn where the hunters on their right and left were stationed before shooting.

[9] Even were the Army negligent in the premises (and the Court does not so find), the plaintiff's negligence under Virginia law would bar recovery.

Mr. Hubbard admitted that the terrain was rough and overgrown with a thick growth of underbrush, that it was snowing and nearly dark, and that he could not see more than thirty yards when he got up from under the tree upon seeing the deer running towards him. He knew, or should have known, where the other hunters were stationed before thus exposing himself. He was briefed to so learn before going on the hunt.

[10, 11] Mr. Hubbard assumed the attendant risk when he voluntarily joined the hunt.[2] He knew or should

[2]See Buffalo Shook Company v. Barksdale, 206 Va. 45, 141 S.E. 2d 738 (1965), for the difference between assumption of risk and contributory negligence. The essence of contributory negligence is carelessness, but of assumption of risk, venturousness—the voluntary assumption of a known hazard. Assumption of risk rests on two premises: (1) that the nature and extent of the risk are fully appreciated; and (2) that it is voluntarily incurred.

have known that hunting deer with a shotgun at relatively close range in a wooded area heavily overgrown with trees and underbrush is a hazardous avocation at best. The release he signed, among other things, should have so warned him.

[12, 13] Everybody has the duty of exercising ordinary care at all times for his own safety—that includes hunters. The care required depends on the circumstances and conditions then existing. Mr. Hubbard failed to exercise such care.[1]

In view of the findings and conclusions here made, it is not necessary that the Court determine whether § 8—654.2 of the Code of Virginia is applicable to this case or whether the general release signed by the plaintiff prior to engaging in the hunt bars his recovery.

The plaintiff's claim against the United States should be dismissed, and an order so decreeing will be entered herein.

Congressman Conte's and the United States' cross-claims will be dismissed for lack of proof.

Counsel for the defendants should prepare an order in accordance with this memorandum opinion, submit it to counsel for the plaintiff for approval as to form, and then to the Court for entry.

Jan 21, 1964

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[1]Negligence, contributory negligence and proximate cause are generally questions for the trier of the facts. See Bates v. Thompson, 200 Va. 501, 106 S.E.2d 728 (1959), and cases cited therein.

## NOTE

In the Petition for Writ of Certiorari references are to pages in the Appendix prepared for use in the Circuit Court of Appeals. Below are listed the corresponding pages of the Transcript of the Testimony:

| Petition | Appendix used in Circuit Court | Transcript |
|---|---|---|
| Page 3 | Page 22-24 | Pl. Ex. No. 27 |
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# In the Supreme Court of the United States

OCTOBER TERM 1970

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No. 1312

HENRY C. HUBBARD, PETITIONER

*v.*

UNITED STATES OF AMERICA

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT*

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## MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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1. This action was brought against the United States under the Federal Tort Claims Act for personal injuries petitioner sustained while deer hunting when he was shot by another deer hunter, Congressman Conte, on a United States Military Reservation.[1]

Petitioner alleged that the government was negligent because it failed to inform the Congressman that

[1] Petitioner also sued Congressman Conte in the same action. A jury returned a verdict in favor of Conte and the appeal was dismissed by consent (Pet. App. 2A).

hunters would be standing in a horseshoe formation and failed to point out to the Congressman where petitioner would be standing. The evidence on these points was in conflict. Congressman Conte, an experienced hunter, testified that he had not been fully briefed on procedures. An Army officer testified, however, that he had in fact instructed Congressman Conte as to the procedures and formation which would be used and had even drawn an explanatory diagram for him. Congressman Conte had also been advised in writing that it was his responsibility to insure he had a safe field of fire.

2. The district court found, after weighing the conflicting evidence, that there was no negligence on the part of the Army and entered judgment in favor of the United States. The court of appeals concluded that this finding was not clearly erroneous and, therefore, affirmed. The factual question of the negligence of the United States has thus been fully resolved adversely to petitioner and does not warrant further review by this Court. *Berenyi* v. *Immigration Director*, 385 U.S. 630, 635; *Graver Mfg. Co.* v. *Linde Co.*, 336 U.S. 271, 275.

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
*Solicitor General.*

MARCH 1971.

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